Supreme Court, U.S.
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No. 06-598

In the Supreme Court of the United States

DOUG HAGOOD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE

Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner is an individual, who is severely mobility impaired due to a career ending, line-of-duty injury as a police officer in 1973, while employed by the Respondents. Petitioner sued under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. 12101 et seq., Title I, alleging discrimination in the operation of the Respondents disability pension plan, which he received through his employment with the Respondent. The district court ruling, which was affirmed by the court of appeals, held that Petitioner must be a "qualified individual with a disability", as defined under Title I, in order to bring a claim under the statute. However, the remedial coverage of Title I provides protections which may be applicable to individuals who no longer meet the definition of a "qualified individual with a disability" because they are no longer working for the employer.

The question presented is as follows:

1. Whether Title I of the ADA is ambiguous with regard to who is a covered individual with standing to bring a claim of discrimination, despite the statutory definition of a "qualified individual with a disability".

PARTIES TO THE PROCEEDING

Petitioner

Doug Hagood is the sole Petitioner. Larry Simpson was a Plaintiff in the original action, but is now deceased.

Respondent

Metropolitan Government of Nashville, Davidson County.

RULE 29.6 STATEMENT

Petitioner has no parent corporation, and no publicly held company owns 10% or more of its stock.

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The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 176 Fed. Appx. 660 (6th Cir. 2006). A copy of the Opinion is included in the Appendix at Appendix B at 3a. The Opinion of the District Court for the Middle District of Tennessee is included in Appendix D at 8a. The District Court ordered entry of the final judgment on April 28, 2005, which is printed in Appendix C at 6a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion on May 9, 2006. On May 18, 2006 Petitioner filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* which the United States Court of Appeals denied on July 28, 2006 (App. A at 1a). This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1) and 2106.

STATUTORY PROVISIONS INVOLVED

Americans with Disabilities Act
42 U.S.C. § 12101

Section 12112(a) of the Americans with Disabilities Act, Title I, prohibits discrimination against a "qualified individual with a disability" because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment" 42 U.S.C. § 12112(a).

Section 12111(8) of the Americans with Disabilities Act, Title I, defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

STATEMENT OF THE CASE

Petitioner is a former employee of the Respondent who was catastrophically injured in the line of duty as a police officer in 1973.[1] Petitioner filed suit on January 21, 2005 under the Americans with Disabilities Act (hereinafter "ADA"), Title I, seeking to prohibit discrimination regarding the operation of the Respondent's disability benefits program. The program provides benefits to former employees who qualified for the program through their employment with the Respondent.

Petitioner alleges in his Complaint that he is discriminated against because he does not receive equal economic benefit under the Respondent's disability benefits program as compared to other program participants, who are paid the same amount in benefits as Petitioner, but are not actually disabled within the meaning of the ADA, and earn significant additional income outside the program in other occupations. The Petitioner is unable to work in any significant capacity and does not have a choice with regard to his participation in the program and the limited benefits he receives. The effect on Petitioner, as well as other similarly situated participants,

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[1] Petitioner was engaged in a high-speed chase of a strong-armed robbery suspect when the vehicle he was traveling in crashed. Petitioner sustained an injury resulting in paraplegia and the eventual amputation of his right leg and hip.

is that they are forced to accept a much lower standard of living than program participants who are not disabled and are able to earn significant income in other occupations.

The District Court had jurisdiction over the original action pursuant to 28 U.S.C. § 1331 because the case presented a federal question arising under the ADA. The venue of the action was proper under 28 U.S.C. § 1391. Respondents filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), claiming that the Complaint failed to state a cause of action. The District Court granted Respondent's motion with regard to Petitioner's claim under Title I of the ADA based on the ground that Petitioner was not a "qualified individual with a disability" as defined by the statute. App. C at 9a. The District Court entered judgment on April 28, 2005.

Petitioner filed a timely appeal with the Court of Appeals for the Sixth Circuit. On May 9, 2006, the Court of Appeals affirmed the District Court's judgment. On May 18, 2006 Petitioner filed a Petition for Panel Rehearing with Suggestion for Rehearing En Banc. On July 28, 2006, the Sixth Circuit denied a petition for rehearing en banc filed by Petitioner.

Petitioner seeks review of the Sixth Circuit's ruling because it is in conflict with this Court's unanimous ruling in *Robinson v. Shell Oil Company*, 519 U.S. 337 (1997), which held that former employees were covered by the definition of "employee" under Title VII of the Civil Rights Act of 1964. The Sixth Circuit's ruling is also in conflict with at least three other circuit decisions, which have relied on *Robinson,* in holding that Title I of the ADA covers former employees who do not meet the technical definition of "qualified individual with a disability".

REASONS FOR GRANTING THE PETITION

A. The Decision in the Court Below undermines this Court's Decision in Robinson v. Shell Oil Company.

In *Robinson* this Court grated certiorari in order to resolve a conflict among the circuits regarding the question of whether or not former employees should be covered by the definition of "employee" as defined in Section 704(a) of Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII") *Id.* at 340. *Robinson* held that Title VII was ambiguous and that former employees were covered by the definition of "employee" because the language of the statute, when read in its entirety, covers various phases of such a relationship. *Id.* at 344. Thus, a strict reading of the statute would defeat the overall purposes intended by enactment of the law. *Id.* at 345.

The *Robinson* ruling is important to the task of analyzing who has standing to bring a claim under Title I of the ADA. Both are remedial statutes, both use similar language and have similar purposes. Additionally, Title VII s influence was present in the formation of the ADA.[2] In *Smith v. City of Jackson*, 528 U.S. 228 (2005) this Court analyzed provisions contained in the Age Discrimination in Employment Act of 1967 (hereinafter "ADEA") in relation to protections found in Title VII because the two statutes generally used the same language, which sought to carry out a similar purpose, and that the two statutes were enacted closely in time. Citing

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[2] During the formation of the ADA the House report regarding its formation stated that the ADA's purpose is "to provide civil rights protections for persons with disabilities that are parallel to those available to minorities and women." H.R. Rep. No. 101-485, pt. 3, at 48 (1990).

Northcross v. Board of Ed. of Memphis City Schools, 412 U.S. 427, 428 (1973) (*per curiam*).

The Sixth Circuit's decision in Petitioner's case effectively limits this Court's decision in *Robinson* by watering down its application to other similar purposed statutes, which encounter the same technical language barriers found in Title VII. Additionally, the Sixth Circuit's ruling limits protections enacted for one minority group, while similar protections enacted for other minority groups have been upheld.

B. The Decision in the Court Below Creates a Split Between the Circuits.

At least three other circuit decisions have relied on this Court's unanimous ruling in *Robinson* (4th Cir.) in order to apply the protections found in Title I of the ADA to individuals who do not meet the technical definition of a "qualified individual with a disability" because the statute, when read in its entirety, provides protections for such individuals. In *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999), the court held that Title I of the ADA was ambiguous and thus, based on the rights created by the statute, former employees could sue their former employers regarding disability benefits. In *Castellano v. City of New York*, 142 F.3d 58 (2d Cir. 1998), the court ruled that former police and fire officers could be considered "qualified individuals with a disability" within the meaning of Title I because they were able to perform the "essential functions" of their jobs during their employment, which is the period of time during which they actually earned their post-employment disability benefits. In *Johnson v. K-Mart Corp.*, 273 F.3d 1035 (11th Cir. 2001) the court held, after a thorough review of *Robinson*, that a former store worker who was advised to stop working by his physician due

to a debilitating mental condition could sue under Title I of the ADA regarding the employer's long-term disability plan.

While the above referenced circuit decisions have relied on *Robinson* in taking the position that a former employee could sue under Title I of the ADA, at least two other circuits, in addition to the Sixth Circuit, maintain an opposite stance. *Gonzales v. Garner Food Service, Inc.*, 89 F.3d 1523 (11th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997) held that a disabled former employee could not sue his former employer under Title I because there was no clear legislative intent to support such a decision and therefore the plain language of the statute should be conclusive. *EEOC v. CNA Ins. Companies*, 96 F.3d 1039 (7th Cir. 1996) took a similar stance based on the fact that no discrimination took place during the actual time of employment. *Parker v. Metropolitan Life Ins. Co.*, 99 F.3d 181 (6th Cir. 1997), *aff'd*, 121 F.3d 1006 (6th Cir. 1997), *cert. denied*, 118 S.Ct. 871 (1998).

In short, the decision of the Sixth Circuit Court of Appeals creates a serious split among the circuits.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-5845

[Filed July 28, 2006]

DOUG HAGOOD, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,	)
Plaintiff-Appellant,	)
v.	)
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,	)
Defendant-Appellee.	)

BEFORE: BATCHELDER and GRIFFIN, Circuit Judges; and ZATKOFF,* District Judge.

ORDER

* Hon. Lawrence P. Zatkoff, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 05-5845

[Filed May 9, 2006]

DOUG HAGOOD, on behalf of themselves and all others similarly situated,	)
Plaintiff-Appellant	)
v.	)
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,	)
Defendants-Appellees	)

ON APPEAL FROM THE STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

BEFORE: BATCHELDER and GRIFFIN, Circuit Judges; ZATKOFF, District Judge.*

OPINION

ALICE M. BATCHELDER, Circuit Judge. Plaintiff-Appellant Doug Hagood appeals the district court's dismissal of his discrimination claim against the Metropolitan Government of Nashville, Tennessee, brought under Titles I and II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 et seq. Hagood is a disabled former police officer who was injured in the line of duty in 1973 and is unable to work in any significant capacity. He receives disability pension benefits through the defendant's disability benefits pension program. He brought this action as a purported class action on behalf of himself and others similarly situated, claiming that the defendants violated both Title I and Title II of the ADA by using a single formula to calculate disability benefits for disabled employees regardless of their respective degrees of disability, which results in a lower standard of living for more severely disabled employees.

The district court granted the defendant's motion for failure to state a claim upon which relief may be granted and dismissed the action. The court held that Hagood had failed to demonstrate that he is a "qualified individual with a disability" as defined by Title I of the ADA, and that he therefore could not meet the threshold requirement for stating a claim under Title I. The court further held that the binding precedent of this circuit holds that employment discrimination

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* The Honorable Lawrence P. Zatkoff, United States District Judge for the Eastern District of Michigan, sitting by designation.

claims, including claims regarding such fringe benefits as long-term disability benefits, are exclusively the province of Title I of the ADA, and that Hagood therefore could not bring his claim under Title II. Finally, the district court held that even if the claims could properly be brought under Title II, he could not meet the requirements of a prima facie case of discrimination because he does not claim that he is being denied access to disability benefits or is being discriminated against under the terms of the disability benefits program solely because of his disability, but rather, claims that the benefits under the plan *should* discriminate on the basis of the degree of disability. Hagood timely appealed.

After carefully reviewing the record, the applicable law, the parties' briefs and counsels' arguments, we are convinced that the district court did not err in its conclusions. As the district court's opinion carefully and correctly sets out the law governing the issues raised, and clearly articulates the reasons underlying its decision, issuance of a full written opinion by this court would serve no useful purpose. Accordingly, for the reasons stated in the district court's opinion, we **AFFIRM**.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

NO. 3:05-0046

[Filed April 28, 2005]

DOUG HAGOOD, et al.	)
	)
v.	)
	)
METROPOLITAN GOVERNMENT OF NASHVILLE/DAVIDSON COUNTY	)
	)

ORDER

Pending before the Court are Defendant's Motion to Dismiss (Docket No. 15) and Defendant's Motion for Leave to File Reply Memorandum (Docket No. 19). Defendant's Motion for Leave to File Reply Memorandum (Docket No. 19) is GRANTED, and the Clerk is directed to file the Reply Memorandum attached thereto.

For the reasons stated in the accompanying Memorandum, Defendant's Motion is GRANTED, and this action is DISMISSED.

The pretrial conference set for June 19, 2006, and the jury trial set for June 27, 2006, are canceled.

IT IS SO ORDERED.

/s/ Todd J. Campbell
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

NO. 3:05-0046

[Filed April 28, 2005]

DOUG HAGOOD, et al.	)
	)
v.	)
	)
METROPOLITAN GOVERNMENT OF NASHVILLE/DAVIDSON COUNTY	)
	)

MEMORANDUM

Pending before the Court is Defendant's Motion to Dismiss (Docket No. 15). For the reasons stated herein, Defendant's Motion is GRANTED, and this action is DISMISSED.

FACTS

Plaintiffs are former employees of the Metropolitan Nashville/Davidson County police force. They bring this action against the Metropolitan Government of Nashville/Davidson County ("Metro") for alleged violations of Titles I and II of the Americans with Disabilities Act

("ADA"), Section 504 of the Rehabilitation Act of 1973 ("Section 504"), the Tennessee Handicap Discrimination Act ("THDA"), and the 14th Amendment to the U.S. Constitution. Plaintiffs contend that Metro discriminated against them (and others similarly situated) through its allegedly unequal and unfair compensation to them under its disability benefits pension program.

Defendant has moved to dismiss the action for failure to state a claim, arguing that Plaintiffs' employment discrimination claims fail because Plaintiffs are not "qualified individuals with disabilities;" that Plaintiffs' access to services claims fail because Plaintiffs do not allege differential treatment; and that Plaintiffs' constitutional claims fail because Defendant's disability benefits plan does not distinguish between similarly situated individuals and, in any event, the disabled are not a suspect class.

MOTIONS TO DISMISS

In considering a motion to dismiss for failure to state a claim on which relief can be granted, the court must accept as true all factual allegations in the complaint. *Broyde v Gotham Tower, Inc.*, 13 F.3d 994, 996 (6th Cir. 1994). The motion should be granted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Id.*

A motion to dismiss for failure to state a claim upon which relief can be granted must be viewed in the light most favorable to the party opposing the motion. *State of Ohio ex rel. Fisher v. Louis Trauth Dairy, Inc.*, 856 F.Supp. 1229, 1232 (S.D. Ohio 1994). The purpose of a motion to dismiss for failure to state a claim is to allow the defendant to test whether, as a matter of law, the plaintiff is entitled to legal

relief even if everything alleged in the complaint is true. *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993).

EMPLOYMENT DISCRIMINATION CLAIMS

Plaintiffs raise employment discrimination claims under the ADA, Section 504 and the THDA. Under each of these statutes, the Plaintiffs must show that they are qualified individuals with disabilities. *Williams v. London Utility Comm'n.*, 375 F.3d 424, 429 (6th Cir. 2004); *Mahon v. Crowell*, 295 F.3d 585, 589 (6th Cir. 2002) (ADA and Rehabilitation Act standards same); and *Roberson v. Cendant Travel Services, Inc.*, 252 F.Supp.2d 573,583 (M.D. Tenn. 2002) (THDA same). A "qualified individual with a disability" is defined in Title I of the ADA as "an individual with a disability who, with or without reasonable accommodation, can perform the essential tractions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

Although Plaintiffs contend, in their Complaint, that they are qualified individuals with disabilities (Docket No. 1, ¶¶ 61 and 71), Plaintiffs also admit that they are both unable to work in any significant capacity. Docket No. 1, ¶¶ 43 and 51. Plaintiffs do not meet the definition of qualified individuals with disabilities set forth above. Therefore, Plaintiffs do not meet a threshold requirement for stating a claim for which relief may be granted on their employment discrimination claims, and those claims are DISMISSED.

Plaintiffs' argument that the statute is ambiguous and, therefore, must be broadly construed, is incorrect. Based upon the cases cited above, and the language of the ADA itself, the Court finds that Plaintiffs must show that they are "qualified

individuals with disabilities" as that term is defined in the statute, and Plaintiffs have not made that showing.

ACCESS TO SERVICES CLAIMS

Title II of the ADA provides that no qualified individual with a disability shall by reason of such disability be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity. 42 U.S.C. § 12132. "Qualified individual with a disability" in Title II of the ADA is defined as "an individual with a disability who, with or without reasonable modifications to rules, policies or practices... meets the essential eligibility requirements for receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131; *Jones v. City of Monroe, Michigan*, 341 F.3d 474, 477 (6th Cir. 2003).

The Court need not determine whether Plaintiffs meet Title II's definition of qualified individual with a disability, however, because the Sixth Circuit has ruled that employment discrimination claims are the exclusive province of Title I of the ADA. *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997); *Schultz v. Alticor/Amway Corp.*, 177 F.Supp.2d 674, 678 (W.D. Mich. 2001). In *Parker*, the court held that provision of a long-term disability plan is a fringe benefit of employment and the provision of fringe benefits is governed strictly by Title I. *Parker*, 121 F.3d at 1015. Accordingly, under the reasoning of *Parker*, Plaintiffs are limited to bringing their claims under Title I of the ADA.

Even if Plaintiffs' claims were properly brought under Title II, Plaintiffs cannot make out a *prima facie* case, which requires showing that (1) they have disabilities, (2) they are otherwise qualified, and (3) they are being excluded from

participation in, being denied the benefits of, or being subjected to discrimination under the program solely because of their disabilities. *Dillery v. City of Sandusky*, 398 F.3d 562, 567 (6th Cir. 2005); *Jones*, 341 F. 3d at 477; *see also People First of Term. v. Arlington Dev. Center*, 878 F.Supp. 97, 100-101 (W.D. Tenn. 1992) (analysis under Section 504 same).

Plaintiffs complain that, because of their catastrophic injuries, they are unable to obtain any significant amount of income outside of the disability benefits program. Plaintiffs complain that they receive relatively the same amount of benefits as those employee participants under the disability benefits program who are less disabled and can pursue other significant employment. Docket No. 1, ¶ 53. Plaintiffs argue that Defendant's administration of the benefit program is not even-handed because it does not take into account the severity of the participant's disability. Plaintiffs do not argue that the benefits actually given are unequal; Plaintiffs are basically arguing that the benefits actually given *should be* unequal, based upon the participant' s particular disability. Neither the ADA nor the Rehabilitation Act requires employers to make such a distinction.

In *Parker*, the court held that the ADA does not mandate equality between individuals with different disabilities. *Parker*, 121 F.3d at 1015. In *People First*, the court held that an action asserting that certain disabled plaintiffs had been the victims of discrimination *vis-a-vis* other handicapped people failed because Section 504 does not Cover discrimination among similarly handicapped people. Here, as in *Parker*, Plaintiffs do not contend that they do not have the same access to the disability program as non-disabled persons.

For these reasons, Plaintiffs' claims under Title II of the ADA and the "access to services" portion of Section 504 cannot be sustained, and those claims are DISMISSED.

CONSTITUTIONAL CLAIMS

Plaintiffs also assert that Defendant has violated the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. The Equal Protection Clause protects against arbitrary classifications and requires that similarly situated persons be treated equally. *Richland Bookmark Inc. v. Nichols*, 278 F.3d 570, 574 (6th Cir. 2002). The Supreme Court has held that the Equal Protection Clause permits a State to classify on the basis of disability so long as it has a rational basis for doing so. *Tennessee v. Lane*, 124 S.Ct. 1978, 1998 (2004). The disabled are not a suspect class under equal protection principles. *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 812 (6th Cir. 2002).

Plaintiffs must show that the disability plan at issue bears no rational relationship to a legitimate state interest. Under the rational basis standard, the program at issue must be afforded a strong presumption of validity and must be upheld so long as there is a rational relationship between the disparity of treatment and some legitimate government purpose. *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000). Here, there is no disparity of treatment. The disparity is in the severity of the participants' disabilities, which is not caused by any alleged discrimination of the Defendant. Because the disability benefits pension plan at issue makes no distinction between participants, it bears a rational relationship to Defendant's efforts to administer its plan in a fair and nondiscriminatory way. The change sought by Plaintiffs is a policy decision for Metro and not the Court. Plaintiffs cannot establish their Equal Protection claims, and those claims are DISMISSED.

CONCLUSION

For the reasons set forth above, Defendant's Motion to Dismiss (Docket No. 15) is GRANTED, and this action is DISMISSED.

IT IS SO ORDERED.

/s/ Todd J. Campbell
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

Supreme Court U.S.
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No. 06-598

IN THE

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DOUG HAGOOD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

The instant Petition focuses on Mr. Hagood's claim that the Metropolitan Government discriminated against him on the basis of a "disability" in violation of Title I of the Americans with Disabilities Act. The district court dismissed this claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and the Sixth Circuit upheld the district court's dismissal. The district court, and the Sixth Circuit, held that Mr. Hagood's Title I claim fails because: (1) he does not fit the definition of "qualified individual with a disability;" and (2) even if he did meet this definition, the Metropolitan Government's disability benefit program provides benefits in a "fair and nondiscriminatory manner."

Mr. Hagood's Petition focuses exclusively on whether the lower courts erred in concluding that he does not meet the definition of "qualified individual with a disability." He does not address the issue of whether the Metropolitan Government's disability benefit program provides benefits in a "fair and nondiscriminatory manner."

With this background, the questions presented by this Petition are:

1. Whether Mr. Hagood has presented compelling reasons to grant this Petition, notwithstanding the independent, alternative basis for the Sixth Circuit's decision, which Petitioner has not challenged?

2. Whether review of Mr. Hagood's Petition would represent an "expression of abstract opinion"?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Parties to the Proceeding

There are no parties to the proceedings other than those listed in the caption.

Rule 29.6 Statement

Respondent, The Metropolitan Government of Nashville and Davidson County, Tennessee, has no parent corporation, and no publicly held company owns 10% or more of its stock.

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SUMMARY OF REASONS FOR DENYING THE PETITION

Mr. Hagood's Petition focuses exclusively on whether the lower courts erred in concluding that he does not meet the definition of "qualified individual with a disability." He does not raise the issue of whether the Metropolitan Government's disability benefit program provides benefits in a "fair and nondiscriminatory manner," an independent, alternative ground for the underlying decision. Because Mr. Hagood does not challenge this alternative ground, he is asking this Court to issue an "expression of abstract opinion," which the Court is loathe to do. Furthermore, the alternative ground for the Sixth Circuit's opinion does not raise a split among the circuits, nor does it implicate this Court's decision in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

For these reasons, Mr. Hagood's Petition does not merit review in this Court. Accordingly, the Metropolitan Government requests that the Court deny Mr. Hagood's Petition.

STATEMENT OF THE CASE[1]

I. Statement of Facts[2]

A. Mr. Hagood's Employment With the Metropolitan Government and Receipt of Disability Pension Benefits

Mr. Hagood is a former Metropolitan Police Officer. (Jt. Apx. 11) On December 19, 1973, Mr. Hagood was injured in the line of duty when he was involved in an automobile accident. (Jt. Apx. 11) As a result of his injuries, Mr. Hagood is not able to work "in any significant capacity." (Jt. Apx. 12) From 1975 to the present, Mr. Hagood has received a disability pension from the Metropolitan Government. (Jt. Apx. 12-13)

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1. Petitioner Doug Hagood will be referred to as "Petitioner" or "Mr. Hagood." The Metropolitan Government of Nashville and Davidson County, Tennessee will be referred to as the "Metropolitan Government." The Sixth Circuit Court of Appeals will be referred to as the "Sixth Circuit" or "Court of Appeals." Mr. Hagood's Petition for Writ of Certiorari will be referred to as the "Petition." Citations to the Record will be made in one of two ways. Those items that are included as appendices to the Petition will be referred to as "(Petition, Appendix __)". Citations to items not included in the Petition will be made to the Joint Appendix on file with the Clerk of the Sixth Circuit, and designated as "(Jt. Apx. __)".

2. The "facts" set forth herein are drawn from Mr. Hagood's Complaint and the Metropolitan Code of Laws. "A court that is ruling on a Rule 12(b)(6) motion may consider materials in addition to the complaint if such materials are public records or are otherwise appropriate for the taking of judicial notice." *New England Health Care Employees Pension Fund v. Ernst & Young*, 336 F.3d 495, 501 (6th Cir. 2003). The Metropolitan Code of Laws is a matter of public record that the district court appropriately considered in ruling on the Metropolitan Government's motion to dismiss.

B. Calculation of Disability Pension Benefits Under the Metropolitan Code

The Metropolitan Government's Code of Laws governs the calculation of a disability pensioner's annual benefit. Under the Metropolitan Code, the annual benefit payable to any disability pensioner is his or her "net disability pension," which equals the pensioner's "gross disability pension" minus: (1) any social security benefit the pensioner receives; and (2) the appropriate "disability pension deduction." (Jt. Apx. 71)

A pensioner's "gross disability pension" ranges from 60 to 70 percent of his or her earnings over the twelve months preceding retirement, depending upon whether the pensioner has dependent children. (Jt. Apx. 71) This number is then reduced by: (1) any social security benefit the pensioner receives; and (2) the appropriate "disability pension deduction." (Jt. Apx. 71)

A reduction based upon the pensioner's receipt of social security benefits is self-explanatory. The "disability pension deduction" is a provision whereby disability pensioners may earn a limited amount of outside income without having their pension benefits reduced. If a pensioner goes over this limitation, however, his or her pension benefits are reduced on a dollar-for-dollar basis for any amount over the limit. (Jt. Apx. 71, 76-77)

II. Proceedings Below

On January 21, 2005, Petitioner Doug Hagood filed suit against Respondent, the Metropolitan Government of Nashville and Davidson County, Tennessee. (Jt. Apx. 4) Mr. Hagood asserted five causes of action against the

Metropolitan Government: (1) employment discrimination under Title I of the ADA; (2) discriminatory denial of public services in violation of Title II of the ADA; (3) employment discrimination and discriminatory denial of public services in violation of Section 504 of the Rehabilitation Act; (4) employment discrimination under the Tennessee Handicapped Discrimination Act; and (5) violation of the Equal Protection Clause of the United States Constitution. (Jt. Apx. 14-21) All of Mr. Hagood's claims hinged upon his contention that the Metropolitan Government's disability pension plan is discriminatory insofar as it uses the same formula to calculate disability benefits regardless of the pensioners' specific physical or mental impairment. (Jt. Apx. 14-21)

On March 24, 2005, the Metropolitan Government moved to dismiss Mr. Hagood's claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Jt. Apx. 32) The district court granted the Metropolitan Government's motion on April 28, 2005, dismissing Mr. Hagood's Complaint in its entirety. (Petition, Appendix C)

On May 16, 2005, Mr. Hagood filed a notice of appeal. (Jt. Apx. 31) On May 9, 2006, the Sixth Circuit issued its decision upholding the district court's grant of the Metropolitan Government's motion to dismiss in its entirety. (Petition, Appendix B)

On May 18, 2006, Mr. Hagood filed a petition for rehearing and suggestion for rehearing *en banc*. On July 28, 2006, the Sixth Circuit denied Mr. Hagood's petition for rehearing and suggestion for rehearing *en banc*. (Petition, Appendix A)

Mr. Hagood filed his Petition for Writ of Certiorari in the United States Supreme Court on October 26, 2006.

REASONS FOR DENYING THE PETITION

I. Because Mr. Hagood Does Not Raise all of the Grounds for the Underlying Decision, He is Asking This Court to Issue An Advisory Opinion

Mr. Hagood raises one issue on appeal – whether Title I of the Americans with Disabilities Act ("ADA") is ambiguous with respect to who has standing to file suit, notwithstanding the statutory definition of "qualified individual with a disability." (Petition, p. i). Title I of the ADA prohibits discrimination against a "qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Under Title I of the ADA, "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds." 42 U.S.C. § 12111(8).

Mr. Hagood asserts that the district court and the Sixth Circuit erred in concluding that he does not fall within the definition of "qualified individual with a disability;" however, Mr. Hagood does not challenge the independent, alternative grounds for the underlying decision. The district court actually dismissed Mr. Hagood's ADA claims on three separate grounds. First, the court held that Mr. Hagood is not a "qualified individual with a disability." (Petition, Appendix D) Second, the district court held that Mr. Hagood's "access to services" claim fails because

employment discrimination claims are the exclusive province of Title I of the ADA. (Petition, Appendix D) Finally, the district court held that even if Mr. Hagood had standing to sue under the ADA, his claims would fail because the Metropolitan Government's disability benefit program provides benefits in a "fair and nondiscriminatory manner." (Petition, Appendix D). As the district court noted, Mr. Hagood does not allege that the benefits he receives are unequal. (Petition, Appendix D) To the contrary, Mr. Hagood argues that the benefits he receives *should be unequal*, based upon his particular disability. But as the district court held, the ADA does not require that the Metropolitan Government provide differential treatment. (Petition, Appendix D)

On appeal, the Sixth Circuit affirmed the district court's decision on all three grounds, in effect, adopting the district court's reasoning. (Petition, Appendix B) The Sixth Circuit also noted that Mr. Hagood "does not claim that he is being denied access to disability benefits or is being discriminated against under the terms of the disability benefit program solely because of his disability, but rather, claims that the benefits under the plan *should* discriminate on the basis of the degree of disability." (Petition, Appendix B)

In his Petition, Mr. Hagood asserts that the district court granted the Metropolitan Government's motion to dismiss on one "ground" – he does not fit the statutory definition of "qualified individual with a disability." (Petition, p. 3) Mr. Hagood fails to mention the additional basis for the district court and the Sixth Circuit's decisions. Because Mr. Hagood has not challenged the alternative basis for the underlying decision, even if this Court were to grant certiorari, the

outcome of this case would be no different. Mr. Hagood is, in effect, asking this Court to issue an advisory opinion, which the Court is loathe to do. *See Mills v. Rogers*, 457 U.S. 291, 305 (1982) ("review of one basis for a decision supported by another basis not subject to examination would represent an 'expression of abstract opinion.'") (citations omitted); *Ford v. Schering-Plough Corp.*, 145 F.3d-601, 615 (2nd Cir. 1998) (Alito, J., concurring) ("In light of the ease with which Ford's claims can be resolved under section 501(c), I would not reach the more difficult issues of: 1) whether a former employee who can no longer work can meet Title I's "qualified individual with a disability" requirement. . . .")

For this reason, the Court should deny Mr. Hagood's Petition.

II. Petitioner Has Not Demonstrated Any Disagreement Between the Circuit Courts on the Merits of His Case

The crux of Mr. Hagood's argument is that there is a split among the circuit courts as to whether a former employee who is unable to perform the essential functions of his or her job may bring suit under Title I of the ADA. While focusing on this issue ignores the lower courts' holding that his case fails on the merits, even if Mr. Hagood had raised the alternative grounds, his Petition should be denied because there is no split in authority on this issue.

To the contrary, two of the cases Mr. Hagood cites - *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (2nd Cir. 1998), and *Castellano v. City of New York*, 142 F.3d 58 (2nd Cir. 1998) – actually support the Sixth Circuit's analysis. In *Ford*, the

Third Circuit Court of Appeals addressed: (1) whether a former employee who is no longer able to perform the essential functions of her job, with or without an accommodation, can maintain a claim under Title I of the ADA; and (2) whether an employer violates Title I of the ADA by offering an insurance plan that is accessible to all employees, regardless of disability, but that provides different levels of coverage for different types of disabilities. 145 F.3d at 608-10. While the Third Circuit held that a former employee can maintain a claim under Title I, it upheld the district court's grant of Schering-Plough's motion to dismiss, because "[s]o long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for every type of disability." *Id.* at 608.

The Second Circuit took the same approach in *Castellano*. In *Castellano*, the Second Circuit held that while a former employee presently receiving disability pension benefits could bring suit under Title I of the ADA, "[t]he ADA requires only that persons with disabilities have the opportunity to receive the same benefits as non-disabled officers who have given an equivalent amount of service." 142 F.3d at 70-71.

The only opinion Petitioner cites that would constitute a contrary ruling – *Johnson v. K-Mart Corporation*, 273 F.3d 1035 (11th Cir. 2001) – has been *vacated* pending review by the Eleventh Circuit *en banc*. *Id.* at 1070. Since that time, all action in the case has been stayed pending resolution of K-Mart's bankruptcy petition. *Johnson v. K-Mart*, 281 F.3d

1368 (11th Cir. 2002).[3] Accordingly, as multiple courts have held, *Johnson* has no binding effect. *See EEOC v. Group Health Plan*, 212 F. Supp.2d 1094, 1098 n.5 (E.D. Mo. 2002); *Breen v. Carlsbad Municipal Schools*, 67 P.3d 908, 916 (Ct. App. N.M. 2003); *reversed on state law grounds*, 120 P.3d 413 (N.M. 2005).

Finally, the conclusion that Mr. Hagood's claim fails on the merits is consistent with the Equal Employment Opportunity Commission's Compliance Manual. According to the EEOC's Compliance Manual,

> If a charge alleges that the terms of an employee benefit plan discriminates on the basis of a

3. Mr. Hagood cites *Johnson v. K-Mart Corporation* for the proposition that the Eleventh Circuit holds that a former employee who is unable to perform the essential functions of his or her job may bring suit under Title I of the ADA. (Petition, pp. 5-6). As discussed above, *Johnson* has been *vacated*. Furthermore, the Eleventh Circuit revisited this issue in *Slomcenski v. Citibank*, N.A., 432 F.3d 1271 (11th Cir. 2005). In *Slomcenski*, the Eleventh Circuit held that a former employee who was drawing disability benefits *cannot* bring suit under Title I of the ADA, stating:

> > Slomcenski could not have been considered a qualified individual with a disability when Citibank attempted to enforce the mental or nervous disorder limitation provision against her in January 2002 because her claim for [long term disability] benefits was premised on her representation that she was unable to perform every occupation for which she was qualified or could become qualified. *** Because Slomcenski could not demonstrate that she was a qualified individual with a disability as required to bring a claim under the ADA, the district court properly granted summary judgment in favor of Citibank on [her] ADA claim.
>
> *Id.* at 1281.

> disability, the first question is whether the employer has provided benefits to a qualified employee with a disability that are *equal* to the benefits provided to employees generally under the plan. *** *If the employer has provided equal benefits, there is no ADA violation.*

EEOC Compliance Manual § 3-IV (emphasis added); *see also Williams v. London Utility Commission*, 375 F.3d 424, 428 (6th Cir. 2004) (holding that the plaintiff must show discrimination on the basis of his or her disability to present a prima facie case). *Id.* at 344-45.

Because Mr. Hagood's claim fails on the merits, his Petition should be denied.

III. The Dismissal of Petitioner's Case on the Merits Does Not Implicate The Supreme Court's Decision in *Robinson* and is in Accordance with Supreme Court Precedent

In his Petition, Mr. Hagood argues that the Sixth Circuit's holding in the instant case is inconsistent with *Robinson v. Shell Oil Company*, 519 U.S. 337 (1997). As an initial matter, the statutory definition of "employee" is far different than the statutory definition of "qualified individual with a disability." Furthermore, in *Robinson*, the Court did not address the merits of the plaintiff's Title VII claim. In *Robinson*, the Court addressed whether former employees fall within the statutory definition of "employee" for purposes of Title VII of the Civil Rights Act of 1964. *Id.* at 344-45.

In the instant case, the lower courts addressed Mr. Hagood's standing and the merits of his ADA claim. This

Court's decision in *Robinson* has no bearing on whether the district court and the Sixth Circuit correctly decided that Mr. Hagood's claim fails on the merits. In fact, the dismissal of Petitioner's claim on the merits is consistent with this Court's decisions in *Alexander v. Choate*, 469 U.S. 287, 305 (1985) (holding that the Rehabilitation Act "does not . . . guarantee the handicapped equal results from the provision of state Medicaid, even assuming some measure of equality of health could be constructed"), and *Traynor v. Turnage*, 485 U.S. 535, 549 (1988) (holding that "[t]here is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons").[4]

CONCLUSION

Mr. Hagood's Petition focuses exclusively on whether the lower courts erred in concluding that he does not meet the definition of "qualified individual with a disability." He does not raise the issue of whether the Metropolitan Government's disability benefit program provides benefits in a "fair and nondiscriminatory manner," an independent, alternative ground for the underlying decision. Because Mr. Hagood does not challenge this alternative ground, he is asking this Court to issue an "expression of abstract opinion," which the Court is loathe to do. Furthermore, the alternative ground for the Sixth Circuit's decision does not raise a split among the circuits, and does not implicate this Court's decision in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

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4. Cases interpreting the Rehabilitation Act are instructive in analyzing cases brought under the ADA. *See McPherson v. Michigan High Sch. Ath. Ass'n*, 119 F.3d 453, 459-60 (6th Cir. 1997) (*en banc*) ("The ADA has no federal funding requirement, but it is otherwise similar in substance to the Rehabilitation Act, and 'cases interpreting either are applicable and interchangeable.'") (citations omitted).

For these reasons, Mr. Hagood's Petition does not merit review in this Court. Accordingly, the Metropolitan Government requests that Mr. Hagood's Petition be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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(2)

NO. 06-598

In the Supreme Court of the United States

DOUG HAGOOD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE

Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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REPLY BRIEF

In their Brief in Opposition, Respondent claims that Petitioner, Mr. Hagood, does not challenge the independent alternative grounds for the underlying decision of the Sixth Circuit in this case. More specifically, that Mr. Hagood's Petition before this Court does not address the Sixth Circuit's ruling that his claim fails on its merits. However, the Sixth Circuit only addressed the allegations in Mr. Hagood's Complaint under a separate analysis of Title II of the ADA and failed to address the allegations under Title I.

In upholding and adopting the district court's ruling, the Sixth Circuit determined that employment discrimination claims are under the "exclusive province" of Title I of the ADA. The Sixth Circuit additionally ruled that Mr. Hagood's *Title I* claim should be dismissed for failure to state a claim because he was not a "qualified individual with a disability" and thus could not meet a threshold requirement for filing a claim *under Title I*. Therefore, the Sixth Circuit did not address the allegations in Mr. Hagood's Complaint under an analysis of Title I.

The Sixth Circuit then used this ruling with regard to the "exclusive province" of Title I coverage, to hold that Mr. Hagood could not bring a claim under Title II. Finally, the Sixth Circuit held that, even if Mr. Hagood's claim could be brought *under Title II*, his claim did not meet the requirements of a prima facie case of discrimination *under Title II*.

The Respondent erroneously claims that the district court held that even if Mr. Hagood had standing to sue "under the ADA", his claims would fail because the Respondent's program was fair and nondiscriminatory. (Brief in Opposition

at p. 6) However, the district court only made this ruling as it applies to Title II, not the ADA generally, as is asserted by the Respondent. (App. B at 3a-5a)

The district court nor the Sixth Circuit addressed the allegations in Mr. Hagood's Complaint under a Title I analysis. The district court and the Sixth Circuit simply stated that Mr. Hagood could not maintain an action under Title I because he did not meet the statutory definition of a "qualified individual with a disability" and therefore did not consider an analysis.

A RULING FOR PETITIONER'S COULD RESULT IN RELIEF UNDER TITLE I OF THE ADA.

If it is determined by this Court that Mr. Hagood can maintain an action under Title I of the ADA, Mr. Hagood will have the opportunity to have the merits of his claim addressed under Title I by the district court.

Title I of the ADA provides protections against discrimination which includes, "utilizing standards, criteria or methods of administration that have the effect of discrimination on the basis of disability; or that perpetuate the discrimination of others who are subject to administrative control." 42 U.S.C. § 12112(b)(3)(A)(B).

Mr. Hagood's Complaint alleges that other participants, who are placed into the same benefits program of the Respondent, are not disabled within the meaning of the ADA. He alleges that the non-disabled participants "disability" does not affect a major life activity and that they are able, and allowed, to work in a significant capacity, in addition to receiving the benefits under the program. He alleges discrimination because the effects of the program result in a

much lower economic benefit and standard of living for disabled participants, as compared the non-disabled participants. The discrimination occurs because the extreme lack of earning ability of the disabled program participants is not taken into account in the administration of the program. Thus, disabled and non-disabled participants are placed into the same program, which has the effect of a much lower standard of living for the disabled participants, such as himself.

When drafting protections for persons with disabilities under the ADA, this form of discrimination was contemplated by Congress. Congressional findings indicate that, "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusion qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;" 42 U.S.C. § 12101(a)(5).

Mr. Hagood's Complaint allegations were never addressed by the district court nor the Sixth Circuit under an analysis of Title I of the ADA because of their ruling that he did not have standing under Title I to pursue his claim.

CONCLUSION

Mr. Hagood's Petition for Writ of Certiorari should be granted in order to determine who is a covered individual under Title I of the ADA and ultimately determine Mr. Hagood's claim under Title I of the ADA.

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